No. 309.

Petition for Rehearing.

Supreme Court of the United States

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OCTOBER TERM, 1901.

No. 309.

The Louisville Trust Company, Trustee, Etc., Petitioner,

vs.

Leonard Comingor.

PETITION FOR REHEARING.

AUGUSTUS E. WILLSON,
Counsel for Petitioner.

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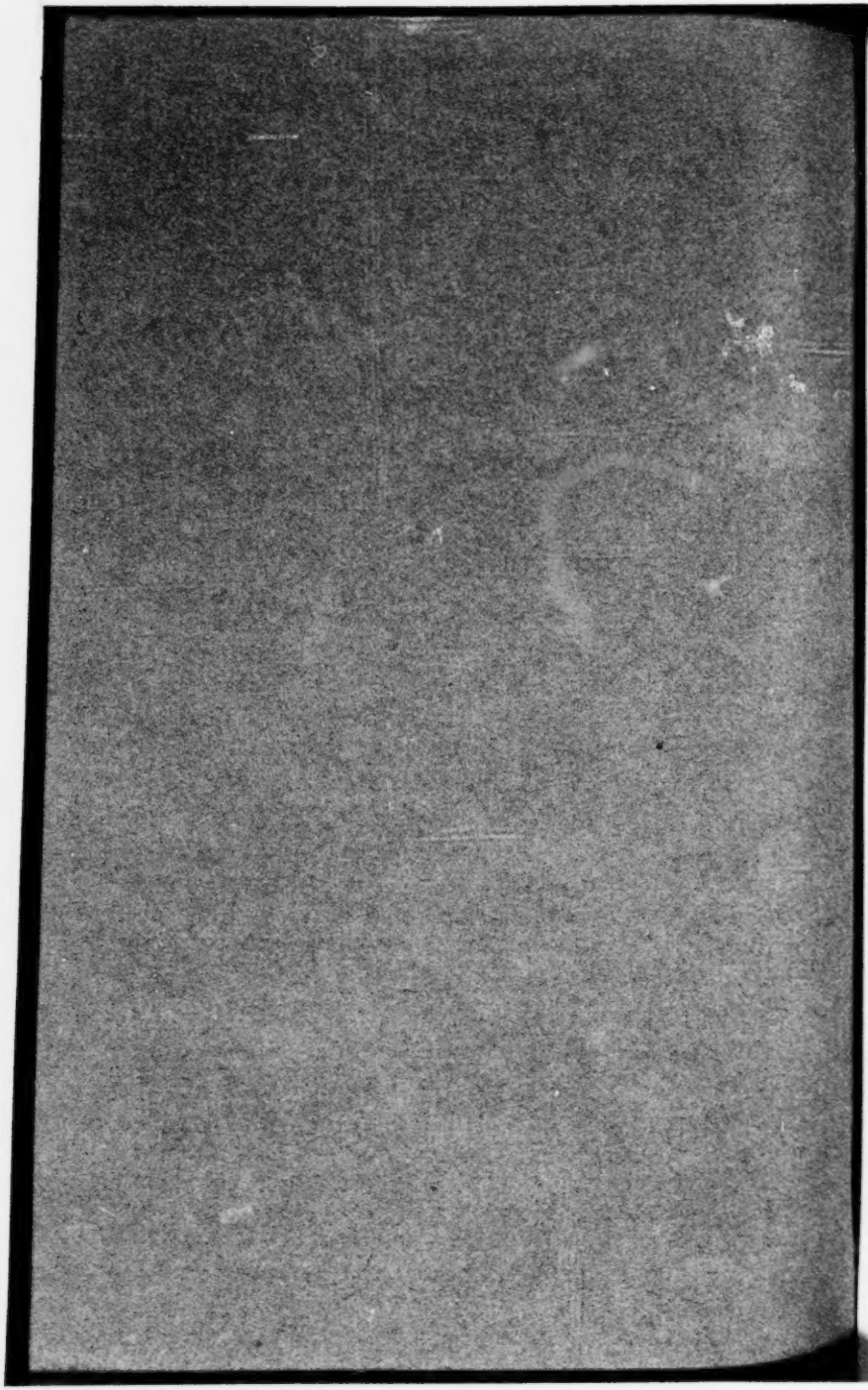

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THE LOUISVILLE TRUST CO., TRUSTEE, ETC., . *Petitioner*,

vs.

LEONARD COMINGOR.

Petition for Rehearing.

The Louisville Trust Company, Trustee of the estate of Simonson, Whiteson & Co., Bankrupts, respectfully petitions this Honorable Court for a rehearing, and for ground of such petition shows:

The sole question in the case, being perhaps a mixed question of law and fact, is this: Was Comingor, to whom the assignment had been made by the bankrupts of all their property under the State law, an adverse holder of the sums of $3,200 and $3,398.90 which, by the district court, he was ordered to deliver to the trustee in bankruptcy?

Almost immediately after the assignment was made the assignee, Comingor, brought his suit in the State court for settlement of his accounts, and under the directions of the court he converted the assets into money. Under the law of Kentucky no stipulated commissions are paid to assignees, the courts allowing only what they may deem reasonable. Until an allowance is made by the court the assignee is

merely the custodian of the fund for the State court, but without any allowance having been made.

Comingor retained an arbitrary amount for his commissions and paid an arbitrary sum to his counsel. The district court held that as Comingor had invoked the jurisdiction of the State court to administer the whole fund, the fund became in *custodia legis*, and therefore that he, Comingor, would not be permitted to say that he held any part of said fund in a capacity different from that recognized by law, and consequently it was decided that he was not and could not become an adverse holder of the fund or any part of it; that he could not, by unlawfully converting the funds to his own use or to the use of his counsel, change the character of his holding from that of assignee to that of adverse holder. Had the State court entered orders allowing these sums to Comingor for his own use and for the use of his attorneys, then he or they might have asserted some individual or colorable title; but holding it merely as the arm of the court, his custody was that of agent only, and it must so remain until a judgment of the court changed the nature of such holding. It has been decided by the Circuit Court of Appeals for this circuit in Leideigh Carriage Co. vs. Stengel, 95 Federal, 637, and also *in re* Lengert Wagon Co., 110 Federal, 927, that the adjudication in bankruptcy ousts the State court of jurisdiction. If this be true, any further steps in the suit which Comingor brought for settlement would be void, because taken in a court which has lost jurisdiction. Hence Comingor can not obtain a decree allowing him any fees, nor can the trustee raise the question of those fees in the State court. If this be not true, if the State court still has jurisdiction to pass on any allowances to Comingor and his attorneys, then that court and not the

bankruptcy court will be administering upon part of the estate in bankruptcy. It has been repeatedly held, under the present law, that neither the assignee nor his counsel is entitled to any commissions or fees where the estate is placed in the bankruptcy court.

In re Pauly, 1 National Bankruptcy News, 405.

Stearns vs. Flick, 2 N. B. N. & R. 1046.

In re McCauley, 2 N. B. N. & R. 1089.

In re Bussey, 3 N. B. N. & R. 928.

In re Tatem, Mann & Co., 4 N. B. N. & R. 83.

It follows, then, that Comingor has not even a colorable title to this fund. If the trustee should be compelled to bring an independent suit in the State court, and that court should allow these fees, it would be in conflict with the Federal law. Surely an adverse holding must be based upon some sort of *bona fide* and colorable title. Suppose a thief had broken into the store and carried away goods held by the assignee; suppose after the adjudication in bankruptcy the trustee had obtained a rule against that thief to deliver those stolen goods; suppose the thief had responded that he had stolen the goods from the assignee before the petition in bankruptcy was filed, could, under these conditions, the court have held that the thief was an adverse holder and therefore not liable to summary process?

So with Comingor. He knew that his title as assignee was uncertain; he knew that bankruptcy would divest him of that title; he knew that he was entitled to no fees and that his attorneys were entitled to no fees until the State court, by which the assets were being administered, should allow them, and he is presumed to have known that if his assignors should be adjudged bankrupts on account of the assignment, neither his attorneys nor himself would be entitled to any fees at all. Yet with all these facts staring him in the face,

he sought to cheat the law and the creditors by appropriating to his own use and to the use of his attorneys about $6,500 of money which he held only as assignee and as agent of the court, and not in his own right, and then he declares to the Federal court: "You have no jurisdiction of me; no right to rule me to pay over this money, for I have misappropriated it and thereby shifted my attitude unlawfully from that of trustee and agent to that of adverse holder." If he can do this; if he can, without the slightest color of law, constitute himself an adverse holder, as to part of the fund, while it is in *custodia legis*, and while he is the court's agent for holding it, why may he not do the same as to all the fund and thereby render wholly inoperative that ground of bankruptcy which was pleaded in this cause?

A holding to be adverse must "involve the element of hostility under a claim or color of title." (Eastern Oregon Land Co. vs. Cole, 92 Fed. 952.) A tenant can not dispute his landlord's title. Can an assignee, the agent of the court and the law, without legal warrant, set up an adverse claim to the fund in his keeping?

It is respectfully submitted that possession alone does not constitute adverse holding; it must be possession accompanied with *some* show or color of right, such as existed in the case of Marshall vs. Knox, 16 Wallace, 551, where the custodian held the property to satisfy a *bona fide* lien for rent. This case might be compared to the position of a receiver of the court. A receiver is but an arm of the court. The assignee, Comingor, was the same. If the court had removed Comingor and appointed another assignee—a by no means uncommon proceeding in Kentucky—could not the court by summary process compel him to turn over the whole fund to the new assignee?

Is not the trustee in bankruptcy the equivalent of a new assignee, even if appointed by a different tribunal? Is he not the successor to the right and title of the assignee? And having succeeded to Comingor's rights and stepped into his shoes, can Comingor, as against this trustee, or new assignee, set up an adverse holding, especially when not even claimed to be based upon any law, allowance or judgment of the court?

Your petitioner respectfully prays for a rehearing.

AUGUSTUS E. WILLSON,
Counsel for Petitioner.

I, Augustus E. Willson, do hereby certify that in my opinion the foregoing petition is well founded in fact and in law, and should be granted.

AUGUSTUS E. WILLSON.

Augustus E. Willson